Filed 3/30/10 Ramirez v. Martinez CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

FELIX RAMIREZ et al.,	
Plaintiffs and Appellants,	E046709
v.	(Super.Ct.No. SCVSS141132)
ALEJANDRO MARTINEZ et al.,	OPINION
Defendants and Respondents.	

APPEAL from the Superior Court of San Bernardino County. Janet M. Frangie, Judge. Affirmed.

Aviles & Associates and Moises A. Aviles for Plaintiffs and Appellants.

No appearance for Defendants and Respondents.

Plaintiff Joel Ramirez, his father, Felix and sister Elvia engaged in an intra-family real estate transaction to extinguish an outstanding debt for an unpaid water filtration system in the amount of $6,179.15, which was recorded as a lien on Joel's property when he stopped making payments. They executed documents that included a second trust deed in favor of National One Mortgage Corp., presented by real estate agent Alejandro

Martinez, but later claimed no knowledge of the second trust deed. Plaintiffs sued for accounting, declaratory relief, injunctive relief, quiet title, breach of contract, fraud, notary misconduct, civil conspiracy and unfair business practices.

Defendants Alejandro Martinez and National One Mortgage Corp. served interrogatories, requests for production of documents, and requests for admission on plaintiffs. However, after nearly a year, plaintiffs never responded to discovery, requiring defendants to file motions to compel responses and that the requests for admission be deemed admitted. After business hours and up to midnight on the date of the hearing on the motion, plaintiffs claimed to have served the responses on defendants by fax, but provided no proof to the court hearing the motion. As a result of the matters deemed admitted, judgment was entered in favor of defendants.

Plaintiff appeals from the judgment on the pleadings, claiming their middle-of-the-night facsimile transmission satisfied the statutory requirement of serving responses prior to the hearing on the motion, and that granting the motion was an abuse of discretion. We affirm.

BACKGROUND

Because the standard of review in a motion for judgment on the pleadings is confined to the face of the pleading under attack, the facts alleged in the pleadings are accepted as true. (*Rangel v. Interinsurance Exchange* (1992) 4 Cal.4th 1, 7.) We therefore summarize the facts as alleged in the complaint and in the relevant motions.

After an intra-family real estate transaction failed to extinguish an unpaid debt of $6,179.15 for a water filtration system, Joel Ramirez and his father Felix Ramirez, and

Elvia Ramirez sued real estate agent Alejandro Martinez (Martinez) of National Realty Group and National One Mortgage Corp. (NOMC) and others. On January 23, 2007, defendants Martinez and NOMC filed their answer to the complaint. On January 19, 2007, defendants propounded form interrogatories, special interrogatories, a request for production of documents, and requests for admission, set one.

On February 20, 2007, plaintiffs' counsel requested a 30-day extension of time to respond to the discovery, explaining the extension was requested in good faith due to the attorney's heavy court schedule and other time commitments. On April 6, 2007, plaintiffs requested another extension of time, explaining he could not produce his clients for their depositions due to his heavy court schedule. He promised to have discovery responses available by April 20, 2007, but had been unable to complete the responses due to the voluminous discovery. No responses to the discovery were provided.

When plaintiffs had not responded to the outstanding discovery by April 20, 2007, defendants' counsel made numerous calls to the office of plaintiffs' counsel but plaintiffs' counsel did not return the calls. On April 23, 2007, defendants' counsel served a "meet and confer" letter demanding responses to all outstanding discovery no later than the close of business on April 25, 2007. Still, plaintiffs did not respond to the discovery requests. On May 31, 2007, defendants' counsel sent a second "meet and confer" letter to plaintiffs' counsel, demanding responses by the close of business June 5, 2007. Defendants' counsel informed plaintiffs' counsel he would proceed with a motion to compel and a motion to deem the requests for admission admitted, and seek monetary sanctions.

The court referred the parties to mediation. On November 1, 2007, the mediation could not go forward as scheduled as plaintiff's counsel could not appear. On November 8, 2007, defendants filed a motion or an order that the request for admissions, set one, be deemed admitted and for monetary sanctions of $1,500 against plaintiffs and their counsel. On November 13, 2007, defendants filed a motion for an order compelling responses to the form interrogatories, special interrogatories, and the request for production of documents, as well as for monetary sanctions against plaintiffs and their counsel.

On November 19, 2007, plaintiffs opposed the discovery motions claiming the matters in the requests for admission should not be deemed admitted if plaintiffs served responses before the hearing on the motion. In his declaration, plaintiffs' counsel explained that in June 2007, he was in the process of meeting with plaintiffs to work on responses but the family had gone to Mexico to see an ailing grandmother, and he had not heard from them until a few days before the date of his declaration. Although the declaration states that plaintiffs' responses were attached as exhibits to their opposition, none appear in the record, and no proof of service of any discovery responses was attached.

The matter was heard on December 27, 2007. At the hearing, plaintiffs' counsel orally informed the court that the responses to the requests for admission had been served, offering the testimony of the paralegal who would testify that he faxed the responses on December 26, 2007, and also deposited them in the mail. Defendants' counsel orally informed the court that he had not received them and no other evidence

was presented. Indeed, counsel for plaintiffs acknowledged that he couldn't have received them since they were served the day before.[1] Plaintiffs did not provide the court with a facsimile transmission report showing when (or if) the responses were faxed. The court reminded counsel of the statutory requirement that the responses be verified and that there was no way to determine if the responses were in compliance because they were not received. The court also noted plaintiffs' failure to attach the responses to their opposing pleading failed to meet the requirements of Code of Civil Procedure section 2033.220. The court granted the defense motion to deem admitted the matters referred to in the requests for admission, and for monetary sanctions in the amount of $525.

On January 7, 2008, plaintiffs made a motion to withdraw the deemed admissions on the ground there was substantial compliance with discovery resulting in their improper rejection by the clerk, and defendants' counsel misled the court by stating they were not served prior to the hearing when plaintiffs were faxing the responses all night. Plaintiffs' counsel also stated as a ground that plaintiffs were visiting their ailing grandmother in Mexico City which was a family priority for them, although he did not provide the dates of the visit.

Attached to the motion was a declaration of counsel's paralegal stating that he had served the opposition to plaintiffs' motions on December 2, 2007,along with the responses to discovery, and that on the night of December 26, 2007, he was working making copies and faxing them to plaintiffs' attorney which took until 12:00 a.m.

---

[1] The term "day" is used lightly, since all the evidence indicated the copying and faxing of the responses was done on the night of December 26th, and completed by midnight, which would have been the day of the hearing.

December 27, 2007. However, the proof of service relating to the service by mail of the responses to discovery was dated December 1, 2007, and did not include the actual discovery responses verified by plaintiffs. The proof of service purporting to relate to the faxing of the responses was dated December 26, 2007, and also did not include the actual discovery responses verified by plaintiffs. No facsimile transmission confirmation sheet was attached.

Also attached to the motion was a declaration of counsel's law clerk who claimed to have filed the opposition to plaintiffs' motions as well as the responses to discovery requests. Finally, plaintiffs' counsel attached an unsigned declaration of plaintiff Felix Ramirez, stating that he and his family had gone to Mexico in June 2007, and requesting that the court accept the "Responses to the Admissions served by fax and mail on December 26, 2007, . . ." On February 26, 2008, plaintiffs' motion was heard and denied.

On January 11, 2008, defendants made a motion for judgment on the pleadings based on the matters deemed admitted. Plaintiffs opposed the motion on the ground they actually served the responses to the requests for admission before the hearing on defendants' motion by faxing them the night before. On April 22, 2008, the motion was heard and judgment on the pleadings in favor of defendants on all causes of action was granted. The formal order granting the motion for judgment on the pleadings was filed on May 14, 2008, and an order granting defendants' motion to compel responses to interrogatories was also issued. The order also included monetary sanctions against the

individual plaintiffs and in favor of defendants' counsel. On July 14, 2008, plaintiffs appealed from the judgment on the pleadings.[2]

DISCUSSION

Plaintiffs argue (1) that respondents' oral statements they did not receive the discovery responses does not overcome the "presumption" that they were served by facsimile; (2) the matters should not have been deemed admitted and the admissions should have been withdrawn "if appellants served responses before the hearing on the motion"; (3) the court should have issued a protective order or "some other means" instead of an order deeming matters admitted and a judgment of the pleadings when plaintiffs had to see their ailing grandmother; and (4) because deeming matters admitted is oppressive to plaintiffs who went to Mexico City to see their ailing grandmother, the motion to withdraw the admissions should have been granted. Although stated in various ways, the primary issue on appeal is whether the trial court abused its discretion in granting defendants' motion for judgment on the pleadings after it had previously ordered that the requests were deemed admitted.

Respondents have not filed a brief, apparently unaware that while the original appeal was dismissed for failure to file a civil docketing statement, a new notice of appeal was filed under the present case number. [3]

---

[2] Another notice of appeal was filed by plaintiffs on September 23, 2008, naming each plaintiff individually and stating the appeal was from the order granting judgment on the pleadings.

A. General Legal Principles

Any party may request that any other party to the action admit the genuineness of specified documents, or the truth of specified matters of fact, opinion relating to fact, or application of law to fact. (Code Civ. Proc., § 2033.010.) Each response must be complete, admitting so much of the matter involved as is true (Code Civ. Proc., § 2033.220, subd. (b)(1)), denying what is untrue (Code Civ. Proc., § 2033, subd. (b)(2)), and specifying so much of the matter involved in the request as to the truth of which the responding party lacks sufficient information or belief. (Code Civ. Proc., § 2033.220, subd. (b)(3).) If the requests for admission are objectionable, the responding party may object (Code Civ. Proc., § 2033.230) or seek a protective order. (Code Civ. Proc., § 2033.080, subd. (b).)

Otherwise, the party to whom the requests for admission are directed must sign the response under oath (Code Civ. Proc., § 2033.240, subd. (a)), and serve it on the requesting part within 30 days (Code Civ. Proc., § 2033.250, subd. (a)), unless the parties agree to extend the time for service of the responses. (Code Civ. Proc., § 2033.260, subd. (a).)

If the party to whom requests for admission are directed fails to serve a timely response, the requesting party waives any objection to the requests unless the party has subsequently served a response or the party's failure to do so was the result of mistake,

---

3 Where respondent fails to file a brief, the court may decide the appeal on the record, the opening brief, and any oral argument by the appellant. (Cal. Rules of Ct. rule 8.220(a)(2).) We examine the record on the basis of appellant's brief and reverse only if prejudicial error is found. (*Conness v. Satram* (2004) 122 Cal.App.4th 197, 200, fn. 3, citing *Lee v. Wells Fargo Bank* (2001) 88 Cal.App.4th 1187, 1192, fn. 7.)

inadvertence, or excusable neglect (Code Civ. Proc., § 2033.280, subd. (a)(1), (2)), and the requesting party may move for an order that the requests be deemed admitted. (Code Civ. Proc., § 2033.280, subd. (b).) The court *shall* make such an order unless it finds that the party to whom the requests for admission have been directed has served, before the hearing on the motion, a proposed response to the requests for admission that is in substantial compliance with Code of Civil Procedure section 2033.220. (Code Civ. Proc., § 2033.280, subd. (c) [italics added].) Any matter admitted in response to a request for admission is conclusively established against the party making the admission, unless the court permits a withdrawal or amendment of the admission pursuant to section 2033.300. (*New Albertsons, Inc. v. Superior Court* (2008) 168 Cal.App.4th 1403, 1418.)

B. Propriety of Order Denying Relief from Matters Deemed Admitted.

A party may obtain relief from an admission made in response to a request for admission by leave of court, upon a determination that the admission was the result of mistake, inadvertence, or excusable neglect, and that the party who obtained the admission will not be substantially prejudiced in maintaining that party's action or defense on the merits. (*New Albertsons, Inc. v. Superior Court, supra*, 168 Cal.App.4th at p. 1418; see also Code Civ. Proc., § 2033.300, subds. (a), (b).) This rule applies equally to matters deemed admitted as well as to admissions made in response to a request for admission and eliminates undeserved windfalls obtained through requests for admission and furthers the policy favoring the resolution of lawsuits on the merits. (*Wilcox v. Birtwhistle* (1999) 21 Cal.4th 973, 983.)

Because the statutory language "mistake, inadvertence, or excusable neglect" in Code of Civil Procedure section 2033.300 is the same language found in Code of Civil Procedure section 473, subdivision (d), permitting a court to relieve a party of a judgment or order taken against him through mistake, inadvertence, or excusable neglect, the terms have been interpreted to have the same meaning. (*New Albertsons, Inc. v. Superior Court, supra,* 168 Cal.App.4th at pp. 1418-1419.) Such motions for relief are committed to the discretion of the trial court, with any doubts being resolved in favor of the party seeking relief from default. (*Id.* at p. 1419, citing *Elston v. City of Turlock* (1985) 38 Cal.3d 227, 233.) The trial court's discretion to deny a motion for relief based on the failure to establish excusable neglect is limited to circumstances where inexcusable neglect is clear. (*Id.* at p. 235.) Denial of relief is appropriate where the discovery violations are willful. (*Standard Microsystems Corp. v. Winbond Electronics Corp.* (2009) 179 Cal.App.4th 868, 906.)

An order denying discretionary relief under section 473 is more carefully scrutinized on appeal than an order permitting trial on the merits. (*Rodriguez v. Henard* (2009) 174 Cal.App.4th 529, 535, citing *Elston v. City of Turlock, supra,* 38 Cal.3d at p. 233.) Attorney error can constitute excusable neglect, depending on the nature of the error and whether counsel was otherwise diligent. (*Bettencourt v. Los Rios Community College Dist.* (1986) 42 Cal.3d 270, 276, 278.) If the neglect by counsel is of the excusable variety, relief may be warranted. (*Conway v. Municipal Court* (1980) 107 Cal.App.3d 1009, 1018.) However, where an attorney's neglect is inexcusable, it is imputed to the client, and does not warrant relief. (*Ibid.*) No neglect, inadvertence, or

mistake was alleged in the trial court or on appeal. Plaintiffs assume that visiting ailing relatives will excuse discovery abuses, but cited no authority in the trial court or on appeal to support their contention. On this ground alone, the trial court was justified in denying relief from the order deeming matters admitted.

Plaintiffs argue that respondent's oral assertion that discovery responses were not received did not overcome the presumption they were not served by facsimile. However, we do not presume that the discovery responses were served by mail or facsimile before the hearing or on any date. A presumption is an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in an action. (Evid. Code, § 600, subd. (a).) Plaintiffs never proved the responses were served and they offered no evidence to contradict defendants' counsel's statement they were never received.

Although plaintiffs offered documents purporting to be proofs of service, the dates on the proofs of service are inconsistent with other purported evidence of service,[4] and they were not accompanied by any documents allegedly served showing the responses were properly verified. Because relief from an order deeming matters admitted is predicated upon conformity with Code of Civil Procedure section 2033.220 (Code Civ. Proc., § 2033. 280, subd. (c)), requiring a demonstration that the responses were properly

---

[4] For example, while the moving papers and declarations in support of same averred that the responses were served first by mail on December 2, 2007, the alleged proof of service states they were served on December 1, 2007. The declaration also states the responses were mailed and faxed on December 26, 2007, but is contradicted by the explanation that the paralegal was working on copying and faxing until midnight, which would have been December 27th.

verified by the responding parties, the failure to lodge the originals with their motion negates any presumption that responses had been served prior to the hearing.

Plaintiffs also assert they were entitled to relief from the order deeming the matters admitted "if appellants served [the] responses [prior to] the hearing." As we have explained, there is no evidence in the record showing the responses were served prior to the hearing. Thus, plaintiffs did not establish grounds for relief. It would have been a simple thing to attach the facsimile transmission confirmation page showing that documents were sent to plaintiffs' counsel's fax number. It would have been even simpler to produce the originals of the verified responses to lodge with the court. However, a more fundamental obstacle to relief relates to plaintiffs' acknowledgment that the copying and faxing of the responses was completed by midnight, which would have been the day "of" the hearing, not "before" the day of the hearing.

Finally, the showing on defendants' motion established that plaintiffs' counsel requested two extensions of time for press of business prior to June 2007, when plaintiffs claim to have gone to Mexico, and that plaintiffs' counsel failed to return any of the six telephone messages left for him by defendants' counsel. Plaintiffs' counsel attempted to blame the lack of compliance with discovery on the fact his clients had gone to Mexico, but the responses were already well overdue before they left. None of the evidence presented at the hearing or in the plaintiffs' motion indicated how long they were gone or explain why they could not have complied with discovery before they left, while they were in Mexico, or upon their return.

Plaintiffs and their counsel had the burden of establishing inadvertence, excusable neglect, or mistake to be entitled to relief. (*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 258.) While any doubts are usually resolved in favor of a party moving for relief (*New Albertsons, Inc. v. Superior Court, supra,* 168 Cal.App.4th at p. 1420), plaintiffs here made no showing whatsoever. Plaintiffs did not dispute defendants' counsel's representation that he had never received any responses to discovery, and did not explain why they did not provide or lodge the actual responses to discovery at the hearing, or as exhibits to their motion for relief (even though their motion claimed that the responses were attached).

Even if we accept as true the statement that plaintiffs went to Mexico to be with an ailing relative, they have not shown how that fact interfered with their discovery obligations. Because plaintiffs' counsel's only extension requests were based on a heavy schedule, he did not demonstrate any mistake or inadvertence in failing to obtain the necessary discovery responses. The failure to respond to the requests for admissions was not excusable.

C. Propriety of the Order Granting Terminating Sanction.

Terminating sanctions are authorized for misuses of the discovery process, which includes failing to respond or to submit to an authorized method of discovery (Code Civ. Proc., § 2033.010, subd. (d)), or failing to confer in person, by telephone, or by letter with an opposing party or attorney in a reasonable and good faith attempt to resolve any discovery dispute. (Code Civ. Proc., § 2033.010, subd. (i); *Liberty Mutual Fire Ins. Co. v. LcL Administrators, Inc.* (2008) 163 Cal.App.4th 1093, 1101.) Obstinacy or

recalcitrance in failure to produce documents or provide proper written answers to discovery justifies the imposition of terminating sanctions. (*Reedy v. Bussell* (2007) 148 Cal.App.4th 1272, 1292-1293.)

Despite the policy favoring trial on the merits, an order granting a terminating sanction is still a matter within the court's broad discretion, subject to reversal only for manifest abuse exceeding the bounds of reason. (*Reedy v. Bussell, supra*, 148 Cal.App.4th at p. 1293.) In making such an order, the court considers the totality of the circumstances: whether the party's actions were willful; whether the propounding party will suffer detriment; and the number of formal and informal attempts to obtain the discovery. (*Lang v. Hochman* (2000) 77 Cal.App.4th 1225, 1246.) Such an order will be affirmed despite the availability of lesser sanction where there is no indication such lesser sanction would be effective. (*Reedy v. Bussell, supra*, 148 Cal.App.4th at p. 1293; see also *Lang v. Hochman, supra*, at pp. 1245-1246.)

Plaintiffs assert that lesser sanctions should have been imposed because plaintiffs had to travel to Mexico to see their ailing grandmother. We acknowledge that ordinarily courts apply a graduated system of enforcement respecting discovery violations. (See *Wilcox v. Birtwhistle, supra,* 21 Cal.4th at p. 982.) However, a nonresponding party can only escape a binding admission by establishing mistake, inadvertence, or excusable neglect, as well as no substantial prejudice to the propounding party. (*Ibid.*) No such showing was made here.

Further, the question here is not whether the trial court should have imposed a lesser sanction; rather, it is whether the trial court abused its discretion by imposing the

sanction it chose. (*Liberty Mutual Fire Ins. Co. v. LcL Administrators, Inc., supra,* 163 Cal.App.4th at p. 1105.) While the discovery statutes contemplate a graduating system of enforcement (*Wilcox v. Birtwhistle, supra,* 21 Cal.4th at p. 982), a court is not required to impose lesser sanctions. (*New Albertsons, Inc. v. Superior Court, supra,* 168 Cal.App.4th at p. 1426.) Where misconduct in connection with the failure to produce evidence is sufficiently egregious, the court may be justified in imposing nonmonetary sanctions even absent a prior order compelling discovery. (*Ibid.*)

Leaving the country is not an excuse for discovery violations, particularly where plaintiffs left for Mexico after their responses were already overdue.[5] Plaintiffs had not paid any of the monetary sanctions by the date of the hearing on their motion for relief, and still had not provided proof that responses to discovery had been completed and were verified by that date. Lesser sanctions would not have been effective given plaintiffs' obstinacy and recalcitrance, justifying the court's exercise of discretion to impose the terminating sanction. (See *Reedy v. Bussell, supra,* 148 Cal.App.4th at p. 1293.)

Plaintiffs' complaint that the court's denial of relief from the order deeming matters admitted is a harsh consequence when they had to go to Mexico to visit an ailing relative is not well taken. The statutory grounds for relief require a showing of inadvertence, mistake, or excusable neglect, as we have discussed. Plaintiffs did not assert they were ignorant of the outstanding discovery obligations or that they were

---

[5] Leaving the country does not relieve plaintiffs of their obligations as litigants. A plaintiff has the duty at every stage of the proceedings to use due diligence to expedite his case to a final determination. (*Perez v. Grajales* (2008) 169 Cal.App.4th 580, 589.)

laboring under a mistake or excusable neglect. Going to Mexico did not establish any of these factors that would entitle them to relief.

In short, none of plaintiffs' claims amount to assignments of error by the trial court which would entitle them to relief. While the result may have been harsh, we cannot say that it was an abuse of discretion or that it resulted in a miscarriage of justice. Error does not require reversal of the judgment unless the error resulted in a miscarriage of justice. (*Saxena v. Goffney* (2008) 159 Cal.App.4th 316, 332.)

DISPOSITION

The judgment is affirmed. Because respondent failed to file a brief, no costs are awarded in this proceeding.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

s/Ramirez
P.J.

We concur:

s/McKinster
J.

s/King
J.